FILE COPY

IN THE

Supreme Court of the United States

October Term, 1946.

Nos. 759. 760, 781, 782, 811.

THE UNITED STATES OF AMERICA, *Petitioner-Respondent*,

v.

UNITED MINE WORKERS OF AMERICA, an Unincorporated Association, and JOHN L. LEWIS, Individually and as President of the United Mine Workers of America, *Respondents-Petitioners*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF.

ROBERT W. KENNY,
President,
LEONARD B. BOUDIN,
Chairman,
Labor Law Committee,
National Lawyers Guild,
902 20th Street, N. W.,
Washington, D. C.
JOSEPH FORER,
DAVID REIN,
HERMAN A. GREENBERG,
GREENBERG, FORER & REIN,
Counsel for Amicus Curiae.
1105 K Street, N. W.,
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Page

Application for Leave to File Brief 1

BRIEF.

Argument:

I. The District Court had no jurisdiction to issue the temporary restraining order and the preliminary injunction 3
A. The Norris-La Guardia Act applies even though the government was the complainant 3
B. This case involves and grows out of a labor dispute 6
C. The coal strike was not in obstruction of the government's exercise of sovereignty 7
D. The District Court had no inherent jurisdiction to issue the temporary restraining order 8

II. The temporary restraining order and the temporary injunction were invalid as violations of Constitutional liberties 10

III. The proceedings below were erroneous and invalid because of numerous procedural errors, a pervading bias, and unfairness of trial 12
A. The contempt proceedings confused civil and criminal contempt, and the sentence was in punishment of a non-existent crime 13
B. The preliminary injunction was granted without a hearing 15
C. Other instances of bias and confusion 16

Conclusion 17

CITATIONS.

CASES:

American Federation of Labor v. *Swing*, 312 U. S. 321 11
Carlson v. *California*, 310 U. S. 106 11
Carter v. *United States*, 135 F. (2d) 858 ..... 9, 10
Custer v. *McCutcheon*, 283 U. S. 514 4
Ex Parte Fisk, 113 U. S. 713 10
Ex Parte Rowland, 104 U. S. 604 10
Fink v. *O'Neil*, 106 U. S. 272 4
Gompers v. *Bucks Stove & Range Co.*, 221 U. S. 418 13

Page

Green v. *United States*, 9 Wall. 655 4
Hague v. *CIO*, 307 U. S. 496 11
In re Debs, 158 U. S. 584 5
Michaelson v. *United States*, 266 U. S. 42 13
Milk Wagon Drivers Union v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91 ..... 4, 5
McCrane v. *United States*, 307 U. S. 61 13
New Negro Alliance v. *Grocery Co.*, 311 U. S. 91 4
Stapleton v. *Mitchell*, 60 F. Supp. 51 11
Thornhill v. *Alabama*, 310 U. S. 88 11
Thomas v. *Collins*, 323 U. S. 516 ..... 10, 11
United States v. *American Federation of Musicians*, 318 U. S. 741 3
United States v. *Hutcheson*, 312 U. S. 219 3
United States v. *Petrillo*, N. D. Ill., Nov. 25, 1946 11
United States v. *Railway Department Employees*, 286 Fed. 228 5
United States v. *Shipp*, 203 U. S. 563 ..... 9, 10
United States v. *Weirton Steel Co.*, 7 Fed. Supp. 255 3
Wolff Co. v. *Industrial Court*, 262 U. S. 522 11

STATUTES:

Constitution, Art. III, secs. 1 and 2 9
Constitution, First, Fifth and Thirteenth Amendments 11
Norris-La Guardia Act (47 Stat. 70, 29 U. S. C. 101-115) 3, 4, 5, 6, 8, 9
Webb-Pomerene Act (40 Stat. 517, 15 U. S. C. 62) 4
War Labor Disputes Act (57 Stat. 163, 50 U. S. C. App. (Supp. V) 1501-1511) 6, 8
National Labor Relations Act, Sec. 10 (49 Stat. 453, 29 U. S. C. 160 (h)) 5

TEXT BOOKS:

Frankfurter & Greene, The Labor Injunction 5, 6
Holdsworth, History of English Law (sixth ed. 1938) 4
Cyclopedia of Federal Procedure (2d ed. 1944) 15

MISCELLANEOUS:

S. Rep. No. 163, 72nd Cong., 1st Sess. 5
75 Cong. Rec. 5
89 Cong. Rec. 6
Exec. Order No. 9728 7
Federal Rules of Civil Procedure, Rule 42(b) 14
Federal Rules of Civil Procedure, Rule 65(b) 15

IN THE

Supreme Court of the United States

October Term, 1946.

Nos. 759, 760, 781, 782, 811.

THE UNITED STATES OF AMERICA, *Petitioner-Respondent*,

v.

UNITED MINE WORKERS OF AMERICA, an Unincorporated Association, and JOHN L. LEWIS, Individually and as President of the United Mine Workers of America, *Respondents-Petitioners.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF.

APPLICATION FOR LEAVE TO FILE BRIEF.

The National Lawyers Guild prays for leave to file a brief as amicus curiae in the above-entitled case. The applicant has filed with the clerk the written consent of

counsel for the United Mine Workers and John L. Lewis, and has also filed letters from counsel for the government advising that "the United States interposes no objection to the filing of such brief", "provided that the Court is agreeable to that action." The applicant believes that these letters are sufficient to meet Rule 27(9) of the Court, but makes this application in the event it is mistaken.

The National Lawyers Guild is an organization of members of the American bar, one of whose purposes is to represent and express the views of the progressive bar in economic, social and civil liberty fields. It believes that the actions of the government and the court below in this case are contrary to the public interest, infringe fundamental rights of labor, and reverse a whole course of progressive government relations to labor. It believes that these actions, if sustained, will expose the bench and bar to merited criticism. For these reasons and because of the importance of these cases as precedents, the National Lawyers Guild requests leave to file a brief as amicus curiae.

BRIEF FOR AMICUS CURIAE.

ARGUMENT.

I. The District Court Had No Jurisdiction to Issue the Temporary Restraining Order and the Preliminary Injunction.

A. The Norris-LaGuardia Act applies even though the government was the complainant.

In ruling that the Norris-LaGuardia Act[1] did not apply to the present case (R203), the District Court relied on the doctrine that the sovereign is not bound by legislation unless expressly mentioned. The Court held that the act did not oust it of jurisdiction where the government was the complainant in "a matter involving the public interest" (*ibid.*).[2] There was no finding that the government was the employer of the miners, as it is of post-office employees, and no such contention was or can be seriously made in the light of the record.

Since there is no dispute that the activities restrained are among those listed in section 4 of the act, the holding below is thus at variance with this Court's recognition that the Norris-LaGuardia Act does apply in governmental suits.[3]

The sovereignty doctrine, moreover, is only an aid to determining whether a statute imposing duties upon, or limiting the rights of, private persons (such as one requiring buildings to be heated or setting periods of limitation) also controls or limits the government. It goes no further,

---

[1] 47 Stat. 70, 29 U.S.C. 101-115.

[2] And *cf.* the conclusion of law that the defendants were obstructing the government's exercise of its sovereign functions (R99).

[3] *United States* v. *Hutcheson*, 312 U.S. 219, 227, 235; *United States* v. *American Federation of Musicians*, 318 U.S. 741. *Cf. United States* v. *Weirton Steel Co.*, 7 Fed. Supp. 255 (D.Del.).

and does not, for example, make general rules of procedure in civil actions inapplicable to suits by the government.[4] The District Court's ruling, however, unwittingly employs a wholly novel theory that no legislation avails against the government's petition in the absence of express language to the contrary. Under this theory, the government could restrain as violations of the anti-trust laws activities expressly exempted therefrom, as by section 2 of the Webb-Pomerene Act.[5]

Furthermore, the subject-matter of the Norris-LaGuardia Act is itself an express limitation on the sovereign, in that it curtails the authority of one of its branches, the judiciary.[6] The court below thus indulged in the solecism of holding that the judiciary branch of the sovereign escaped from limitations imposed upon it by the legislative branch because these limitations did not apply to the executive branch. The court misconceived the question, which is not whether the "government" is bound, but whether the judicial branch of the government is bound by a statute addressed solely and specifically to it.[7]

The District Court's reliance on a dogma which at best is merely an aid to construction[8] disregarded the background and legislative history of the Norris-LaGuardia Act. That history need not be reviewed here at length; it has been reviewed by this Court itself in *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91.[9] The Act, founded on a distrust of the actions of federal district

---

[4] *Green* v. *United States*, 9 Wall. 655, 658; *Custer* v. *McCutcheon*, 283 U.S. 514; *Fink* v. *O'Neil*, 106 U.S. 272.

[5] 40 Stat. 517, 15 U.S.C. 62.

[6] The Chancellor in his judicial capacity was, of course, as much a vicar of the king as he, or any other minister, was in his executive capacities. 1 Holdsworth, History of English Law (sixth ed., 1938) 395-416.

[7] *Cf. Fink* v. *O'Neil*, *supra*, at p. 280.

[8] *Cf. Green* v. *United States*, *supra*.

[9] See also *New Negro Alliance* v. *Grocery Co.*, 303 U.S. 552, 562.

courts in labor controversies, was intended to end the "abuses of judicial power in granting injunctions in labor disputes".[10] Among the most notorious of these abuses, cited in the legislative debates and reports in support of the bill and causes of its passage, were injunctions issued on complaint of the federal executive.[11] Fantastically enough, the government now cites (R55), in support of its position that the Act does not apply, the very cases[12] which contributed to its passage.

Further orthodox assistance to construction is supplied by the debates[13] on and rejection[14] of the Beck amendment, which sought to preserve the equity jurisdiction where the public welfare was concerned by a labor dispute, and the Blanton amendment, which sought to preserve the equity jurisdiction on petition of the government. It is also supplied by Congress' felt need to expressly create an exception to the Norris-LaGuardia Act to permit courts to issue restraints on the government's applications for enforcement of orders of the National Labor Relations Board.[15] Finally,

---

[10] *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91, 102, quoting S. Rep. No. 163, 72nd Cong. 1st Sess., p. 8.

[11] E.g., *In Re Debs.*, 158 U.S. 584; *U.S.* v. *Railway Department Employees*, 286 Fed. 228 (N.D. Ill.). See Frankfurter & Greene, *The Labor Injunction*, pp. 52, 103, 115, 174, 218, 253; 75 Cong. Rec. 5462-5511; Sen. Rep. No. 163, 72d Cong. 1st Sess., p. 8.

[12] *In Re Debs, U.S.* v. *Railway Department Employees, supra*, note 9.

[13] 75 Cong. Rec. 5472, 5473, 5476, 5500. Thus Congressman Beck lamented that the action taken on the government's application in the *Debs* case would have been impossible if the bill had at that time been law, and Congressman LaGuardia supported the bill by criticizing the government's tactics in "looking around for" and finally selecting an amenable judge to grant a restraint "without a minute's delay" against the railway shopmen's strike.

[14] 75 Cong. Rec. 5505 (defeat of the Beck Amendment), 5503 (defeat of Blanton amendment).

[15] 49 Stat. 453, 29 U.S.C. 160(h).

the legislative history of the War Labor Disputes Act[16] and rejection of amendments to confer injunctive liability thereunder, now that Congress realized that the government was affected by the Norris-LaGuardia Act and that it rejected the labor injunction on application of the government in favor of criminal sanctions as the exclusive enforcement device. Senators and Representatives of both major parties repeatedly expressed opposition to efforts to annul the Norris-LaGuardia Act by permitting the federal government to obtain injunctions to enforce the War Labor Disputes Act.[17]

The court's holding adds to the Norris-LaGuardia Act an exception which subverts its declared policies even more than an allowance of exceptions to private employers. The government, when invoking equity jurisdiction in a labor dispute, has advantages over the employer seeking the same remedy. The government can intervene with an aura of impartiality. Its prestige influences the rank-and-file strikers. It can more readily select a forum favorable to its views—either crassly as in the notorious Wilkerson injunction[18] or, in more orthodox fashion, by using its greater practical flexibility in choosing from the districts where venue will lie.

B. This case involves and grows out of a labor dispute.

The government asserted below that the Norris-LaGuardia Act was inapplicable because "the sovereign, in the exercise of its functions, can at no time be held to be engaged in a labor dispute with private persons" (R57). This novel and somewhat cryptic contention apparently was not too seriously pressed, since it is missing from the District Court's conclusions of law.

Wholly aside from its questionable intrinsic validity, the assertion is completely irrelevant. The Act deprives

---

[16] 57 Stat. 163, 50 U.S.C. App. (Supp. V), 1501-1511.

[17] 89 Cong. Rec. 3901, 3906, 3988, 3992, 5300, 5325, 5372.

[18] Frankfurter & Greene, loc. cit.; note 13, *supra*.

federal courts of jurisdiction "in any case *involving or growing out of* any labor dispute". This case involved and grew out of a labor dispute between the miners and the mine owners, which, like most labor disputes, grew out of demands by the workers for better pay and improved working conditions. The very action by the government in taking control of the mines was occasioned by this labor dispute.[19] And the government's recognition that the issue was between these two parties is shown by its refusal to negotiate with the miners on their demands and its direction that they be addressed to the private mine owners (R30-1, 411). It was this position of the executive that was the immediate occasion of the coal strike (R493-4).

C. The coal strike was not in obstruction of the government's exercise of sovereignty.

The conclusion of the court below that the coal strike obstructed the government's exercise of sovereignty (R99) is at utter variance with the facts. The private owners at all times continued to operate the mines and, subject to one exception, retained all the incidents of their private ownership.[20] The government's exercise of sovereignty, which constituted that exception, consisted solely in its supplanting the mine owners in conducting dealings with the United Mine Workers, that is, in negotiating with the union and directing performance of the terms agreed upon. When the government refused to negotiate with the union on its demands and directed that they be addressed to the mine owners, the government was attempting to surrender the only sovereign function it had exercised. When the miners resisted this position, they were

---

[19] Exec. Order No. 9728 (R335-6).

[20] Thus each company continued operation "in the regular course of business as a going enterprise" with the same personnel (R415-6, 231), for private profit and at private risk (R232). The private owners paid wages and workmen's compensation (R233) and taxes (R234).

actually insisting that the government continue to exercise its sovereign function. And it is for this that the court below concluded that the defendants were obstructing the exercise of the government's sovereign functions!

There was not, therefore, as the District Court misconceived, a conflict between the union and the republic. The government's injunction suit was not to protect the public interest but to support the private mine owners. It was attempting to compel the miners to bargain with the owners and at the same time insisting that they must give up their bargaining power—the right to strike.

If the Secretary of the Interior had sincerely wished to protect the public from a coal strike, he could have continued to do exactly what he had done earlier under the War Labor Disputes Act. He could have bargained with the union just as he did initially. In assistance of his bargaining, or if it was of no avail, the Secretary could have relied on the criminal penalties of the War Labor Disputes Act in an effort to coerce the continuance of work. The course the executive has employed, however, constitutes an ill-concealed effort to enforce by injunction the no-strike provisions of the War Labor Disputes Act, even though injunctive enforcement had been rejected by Congress in its passage of that act and is specifically prohibited by the Norris-LaGuardia Act. The District Court's approval of this device resulted in the imposition of a punishment far greater than that provided by the War Labor Disputes Act and the deprivation of the procedural safeguards provided for defendants in ordinary prosecutions.

D. The District Court had no inherent jurisdiction to issue the temporary restraining order.

It was the theory of both the government and the District Court that even if the Norris-LaGuardia Act applied, the court had jurisdiction to issue a temporary restraining order to preserve the status quo pending its determina-

tion of the jurisdictional question. Leaving aside the debatable point of whether the court's order maintained or disturbed the status quo, this asserted inherent jurisdiction cannot be exercised if denied by Congress under the authority granted it by the Constitution.[21] Such a denial was imposed by the Norris-LaGuardia Act.

First, no inherent jurisdiction exception appears in the flat wording of section 4 that no federal court shall have jurisdiction to issue *any* restraining order against described activities in *any* case involving or growing out of a labor dispute. The government does not dispute the fact that the acts restrained by the District Court are within those listed in section 4.

Secondly, section 7 of the Act permitting temporary restraints of unlawful acts is obviously exclusive both as to the scope of such restraints and the detailed procedures which must be complied with prior to their issuance.

Thirdly, the urged inherent jurisdiction exception would nullify the objectives of the Act. If the legislature did not trust the federal courts to exercise equity jurisdiction in labor disputes, it cannot have trusted them to exercise it as inherent in their jurisdiction. It makes no difference to a union whether a temporary restraint which breaks a strike is issued on a theory of inherent jurisdiction or on some other theory. Furthermore, because of the importance of timing in the collective effort, a strike can usually be as readily broken by a temporary restraint as by a permanent injunction. And even if a ten day restraint is not sufficient to break a strike, it can be, as it was here (R158-60), extended "for good cause". This court can take judicial notice of the fact that the coal strike was in fact broken by the action of the court below.

The government supports its inherent jurisdiction argument by *United States* v. *Shipp*, 203 U.S. 563 and *Carter* v. *United States*, 135 F. (2d) 858(R76-8).

---

[21] Article III, secs. 1 and 2.

In the *Shipp* case, however, there was not involved any statute which, as here, ousted the federal courts of jurisdiction. Furthermore, punishment may not be imposed for violation of a court order which infringes constitutional rights,[22] as, we subsequently contend, did the temporary restraining order in this case. Finally, it appears that the *Shipp* doctrine is applicable only to orders of the Supreme Court, in view of the decisions that no punishment may be imposed for contempt of an order issued by a federal inferior court without jurisdiction.[23]

The *Carter* case represents flagrant error by a divided bench of the Fifth Circuit:

II. The Temporary Restraining Order and the Temporary Injunction Were Invalid As Violations of Constitutional Liberties.

The District Court described its restraining order as only "an order on Mr. Lewis . . . to order these men not to cease work until the merits of the controversy could be determined" (R172-73). It stated that there was no order to the miners "that they could not quit" (R118), and that it did not understand the order as prohibiting the miners from striking (R173). However, the restraining order (and, by the same token, the temporary injunction, which includes identical restraints) plainly prohibited the miners from striking, picketing, and otherwise using their strength collectively. The restraint expressly covers "all persons in active concert or participation" with the union and its president, and the members of the union are such persons. In addition, a restraint which prevented the miners' chosen leaders and trustees from exercising their leadership, and even from informing the miners of their version of a labor controversy, obviously was an effective restraint upon their constituents. The miners

---

[22] *Thomas* v. *Collins*, 323 U.S. 516 (1945).

[23] *Ex Parte Rowland*, 104 U.S. 604, 612; *Ex Parte Fisk*, 113 U.S. 713, 718.

were thus stripped, as a practical matter, of their power to act in an organized, effective and collective manner.

The orders restrained the defendants, and persons in active concert or participation with them, from, among other things, "coercing, instigating, inducing or encouraging the mine workers . . . to interfere by strike, slow down, walkout, cessation of work, or otherwise, with the operation of said mines". It also restrained them "from issuing or otherwise giving publicity to any notice" that the Krug-Lewis agreement had been or would be terminated.

Presumably an individual miner could quit work without violating the orders. But he could not quit in participation with other miners, he could not picket, he could not persuade other miners to quit, and he could not even talk about their alleged contractual privilege to quit. In short, the miners could not combine nor could they be led. They could not *effectively* attempt to enforce their demands for better wages and working conditions.

These restraints thus run afoul of the First, Fifth and Thirteenth Amendments to the Constitution. This Court has repeatedly held that the right to give publicity to the facts of a labor dispute is constitutionally guaranteed,[24] as is the right to strike.[25] Furthermore, servitude can be involuntarily imposed not only by chains but by more sophisticated means, such as preventing access to information which would cause the quitting of work, including information as to the wishes and advice of one's chosen and trusted representatives, and by making quitting of work ineffective to accomplish its purpose.

In the above connection, it should be emphasized that there is not involved here any such question as the right of

---

[24] *Thornhill* v. *Alabama*, 310 U.S. 88; *Hague* v. *CIO*, 307 U.S. 496; *Thomas* v. *Collins*, 323 U.S. 516; *Carlson* v. *California*, 310 U.S. 106; *AFL* v. *Swing*, 312 U.S. 321.

[25] *Wolff Co.* v. *Industrial Court*, 262 U.S. 522; *Stapleton* v. *Mitchell*, 60 F. Supp. 51; *U.S.* v. *Petrillo*, N.D.Ill., Nov. 25, 1946.

the government to prevent its military personnel or even its civilian employees from striking. The miners were employees of the mine owners, not of the government. It is true that on a showing of a need to prosecute a war, the government could probably prohibit strikes even by persons privately employed. But here no such showing was or can be made. It is submitted furthermore, that a prohibition of strikes of private employees would be valid as a war prosecution measure only was part of a more general framework which protected from exploitation those whose own bargaining power had been eliminated. Such a framework would include controls of discharges, controls of wages, and controls of prices. At the time of the coal strike, however, the Administration had abandoned most of the war-time controls which might fit into such a pattern, and has since junked others. Thus price controls had by then been lifted and the Wage Stabilization Board which had inherited some of the authority of the eliminated War Labor Board, had been stripped of power and personnel.

III. The Proceedings Below Were Erroneous and Invalid Because of Numerous Procedural Errors, a Pervading Bias, and Unfairness of Trial.

The proceedings below were so shot through with confusion, bias and mistake as to make the orders entered reversible not only for procedural error but also as invasions of an accused's constitutional right to a fair and orderly hearing. From a broad point of view, this unfairness of trial is chiefly significant, perhaps, as a warning of the abuses which will inevitably attend a recrudescence of the labor injunction. The record supplies a strong, even if hardly needed, confirmation of Congress' historical judgment that federal district judges cannot be trusted to exercise equitable jurisdiction in labor disputes.

A. The contempt proceedings confused civil and criminal contempt, and the sentence was in punishment of a non-existent crime.

We have the trial judge's own word for it that he did not fully understand the difference between civil and criminal contempt.[26] As a result of this misunderstanding, the contempt proceedings and sentences were irregular and erroneous.

The distinctions between civil and criminal contempt have been summarized by this Court in several decisions.[27] A proceeding in criminal contempt is designed to vindicate the authority of a court; a proceeding in civil contempt gives a remedy to a litigant. The procedural and remedial differences which flow from these purposes are the ordinary distinguishing characteristics of civil and criminal proceedings.

To maintain a criminal contempt, it is necessary that the disobedience of the order be wilful. The criminal violation must be proven beyond a reasonable doubt. To maintain a civil contempt, it is necessary to show only disobedience of the order, whether wilful or not, and this only by a preponderance of the evidence. It is also necessary to show damage of an interest of the successful litigant, resulting from disobedience of the order. In a criminal contempt, the penalty is either imprisonment for a fixed term or a fine of a fixed amount which is paid to the state. A fixed term of imprisonment in a civil contempt is error since it is clearly punitive, not remedial; in a civil contempt the contemnor may be imprisoned until such time as he performs the action required by the order which he disobeyed,

---

[26] "The Court [to defendants' counsel]. But if you know the exact difference between civil contempt and criminal contempt, you are the only person in the United States who does" (R191).

[27] *Michaelson* v. *United States*, 266 U.S. 42; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418; *McCrone* v. *United States*, 307 U.S. 61.

and no longer. In civil contempt, a fine payable to the state may not be levied. However, if the successful litigant can demonstrate monetary damage caused by the contemnor's disobedience of the order, he may be awarded a judgment measured by the amount of his damage.

In the present case, the contempt judgment and sentence were supported by a finding of both civil and criminal contempt.

Obviously, a person who disobeys a court order may, under the criteria explained above, have committed both a criminal and a civil contempt, and may be proceeded against on either or both bases. But to combine action on both bases in a single proceeding is clearly irregular. It is, also, as prejudicial to a defendant as it would be to combine in one proceeding a civil action for the tort of battery and a criminal action for the crime of assault. The defendants were particularly prejudiced in the sentences by this combination of proceedings. The fines levied were greatly excessive for the purpose (which would be the only legitimate one in a criminal contempt case) of vindicating the court's dignity, and the court clearly had in mind that the amount of the fine was to be based on the fancied injury to the public.

As a civil contempt the procedure and the penalty cannot be sustained because the government failed to show compensable damage, because the amount of the fine was not computed on any basis of compensation for injury, and finally because it was not awarded as a civil judgment but was levied as a criminal fine.

As a criminal contempt the judgment cannot be sustained because: (1) the notice of hearing did not, contrary to Rule 42(b) of the Federal Rules of criminal procedure, describe the contempt as criminal; and (2) the penalty levied was not for the crime of offending the court's dignity but for an imagined "crime", not in the statutes, of harming the public by a coal strike.

The Court's confusion as to the purpose of the contempt proceeding appears throughout the record. On the one hand, the court repeatedly asserted that the temporary restraining order was issued only to protect its jurisdiction and to enable the parties to the dispute to discuss it with the court (R131, 136, 204, 172-3). On the other hand, it indulged in comment about society's right to protect itself from hunger, starvation and cold (R126), found that irreparable injury had resulted to the entire public (R322), and described the strike as "evil, demoniac, monstrous" and "a threat to democratic government itself" (R328), all this without having had either occasion or opportunity to pass on the merits of the strike or its provocation. The extravagantly large sentences, it is clear from these utterances, were levied as punishment for this fancied threat to society, not for a contempt of the court.

B. The preliminary injunction was granted without a hearing.

At the close of the trial for contempt, the court entered a preliminary injunction without any hearing. This was gross error.[28] The trial for contempt could not supply the place of such a hearing since it did not involve the wholly different issues[29] which relate to granting preliminary injunctions.

In connection with our earlier remarks as to bias, it becomes pertinent to observe that it was only with difficulty that government counsel restrained the court from issuing a final injunction (R322).

---

[28] *Cf.* requirement in Rule 65(b), Federal Rules of Civil Procedure, that a motion for a preliminary injunction be set down for hearing at the earliest possible time if a temporary restraining order is issued.

[29] See Cyc. Fed. Proc. (2d ed. 1944) 6131.

C. Other instances of bias and confusion.

The record contains numerous other instances of confusion and bias on the part of the court below. These in themselves vitiate the orders entered, and particularly the contempt judgment and sentence, which were criminal in nature. Thus while the preliminary motion to discharge the rule to show cause was being argued, and before the introduction of any evidence on the issue of whether a contempt had been committed, the court characterized union counsel's argument that the Norris-LaGuardia Act applied in suits by the government, as follows (R126):

> Mr. Padway, you may be right, but what you are unconsciously contending is this: That when society itself endeavors to protect itself from hunger, starvation, cold, a letting down of production and unemployment, social disintegration, it is engaged in a labor dispute. You may be able to vindicate that position, but that is what you are contending now.

It is submitted that this remark shows that the existence of guilt and of degree of culpability were prejudged. Furthermore, this and other vehement characterizations of the strike, already referred to, demonstrate that the court could not adjudicate the narrow contempt issue before it and impose sentence free of a bias based on an opposition to the coal strike.

Other illustrations of hostility to the defendant or of confusion include: (1) the court's exaggerated observation that it would be "anarchy" if a person could with impunity disregard one of its temporary restraining orders (R145); (2) the confusion as to what issues were being tried, contributed to by the setting down of the contempt hearing

for the same hour that had been previously set for the hearing on the motion for the preliminary injunction (R61, 73); (3) the court's contention that the temporary restraining order did not prevent the miners from striking because it did not so understand the order (R172-3); (4) the court's colloquy with the defendant Lewis (R326-7); (5) the court's concern over the routine step of a stay of execution of judgment on filing a bond pending appeal (R311-3); (6) the excessiveness of the fine coupled with the court's remark that the union would be destroyed if necessary to the preservation of the Republic (329).

CONCLUSION.

We have demonstrated, we believe, that the orders entered below should be reversed and the sentences vacated for statutory and constitutional reasons and for flagrant error. With all deference, we suggest that the District Court was clearly influenced by the hysteria which surrounded the coal strike.

It is unfortunately true that frequently in the history of the American labor movement, from the time when the courts held early efforts at unionization to be criminal conspiracies at common law, the men who work with their hands have had to combat the judiciary's opposition to their efforts to better their lot. Even when labor managed to obtain legislation to protect it from oppression by the judiciary, it found too often that legislative victories were nullified by judicial construction. We pray that in the in-

stant case this situation will not be repeated and that the Court will give full weight to the clear intent of Congress.

Respectfully submitted,

ROBERT W. KENNY,
President,

LEONARD B. BOUDIN,
Chairman,
Labor Law Committee,

National Lawyers Guild,
902 20th Street, N. W.,
Washington, D. C.

JOSEPH FORER,
DAVID REIN,
HERMAN A. GREENBERG,
GREENBERG, FORER & REIN,
Counsel for Amicus Curiae.
1105 K Street, N. W.,
Washington 5, D. C.